APPENDIX A-1

Opinion

United States Court of Appeals

TENTH CIRCUIT
May Term, 1968

UNITED STATES OF AMERICA,
Appellant,

vs.

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS,
Appellees.

No. 9741

Appeal from the United States District Court
for the District of Kansas

Bennet N. Hollander (Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson, Melva M. Graney, Louis M. Kauder, Attorneys, Department of Justice, and Newell A. George, United States Attorney, with him on the brief) for Appellant.

James J. Melching for Appellees.

Before MURRAH, Chief Judge, MARVIN JONES,* Senior Judge, United States Court of Claims, and BREITENSTEIN, Circuit Judge.

JONES, Senior Judge:

On June 19, 1954, decedent Frank E. Washburn had executed a revocable trust under which the income was to be paid to himself during his lifetime, thereafter to his wife

*Sitting by designation of the Chief Justice.

Lucy Tullock Washburn if she survived him, or to his sister if she survived him and his wife. Upon the death of the last income beneficiary, the trust estate was to be terminated and the principal distributed evenly among two charitable organizations and four of decedent's nephews.

Paragraph 5 of the trust empowered the trustee to invade the principal for the benefit of decedent's wife. Because the meaning of this paragraph is crucial to the decision of this case, we quote it in full:

> 5. In the event that the Grantor's wife, Lucy Tullock Washburn, shall survive the Grantor, and the Trust Estate hereby created shall not have theretofore been terminated, then in that event, if at any time or times during the lifetime of the Grantor's said wife, some emergency or contingency shall arise making it necessary or advisable in the sole judgment of the Trustee to pay or distribute to or apply for the benefit of the Grantor's said wife for her comfort, welfare, contentment and happiness, a portion or portions of the principal of said Trust Estate, the Trustee shall have full power and authority to pay or distribute to her, or to use or apply for her benefit for her comfort, welfare, contentment and happiness, such portion of the principal of said Trust Estate as the Trustee in its sole discretion shall deem necessary or advisable in all of the circumstances then existing. In determining the necessity or advisability of making such payments or distributions out of principal to the Grantor's said wife from the Trust Estate, the Trustee may take into consideration other income and cash resources available to the Grantor's said wife, and the Trustee shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her entire lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live; and that while said Trust Estate should not be

depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live, her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in paragraph 9 of this Trust Agreement.

A federal estate tax return was filed on behalf of decedent's estate on June 25, 1958, in which taxpayer[1] attempted to deduct from the gross estate the value of the charitable remainders under Int. Rev. Code of 1954, § 2055 (a)(2). Upon an audit of this return, the charitable deductions were disallowed on the ground that Paragraph 5 of the trust does not provide an ascertainable standard for the invasion of the trust principal. Taxpayer paid the deficiency[2] and filed a claim for refund, which was denied. Taxpayer then brought this suit for refund under Int. Rev. Code of 1954, § 1346(a)(1) in the United States District Court for the District of Kansas. The district court granted taxpayer's motion for summary judgment, *Commercial National Bank* v. *United States*, 265 F. Supp. 806 (D. Kan. 1966), and the government has appealed.

Int. Rev. Code of 1954, § 2055(a)(2) allows a deduction from a decedent's gross estate in the amount of transfers to charitable organizations. Treas. Reg. § 20.2055-2(a) covers situations where the charitable transfer consists of a remainder interest with the intervening life estate belonging to a noncharitable beneficiary. This regulation states that a "deduction may be taken of the value of the

1. The Boatmen's National Bank of St. Louis, trustee, and the Commercial National Bank of Kansas City, administrator of decedent's will, are herein referred to collectively as "taxpayer."

2. The deficiency was based on several other issues in addition to the disallowance of the charitable deductions, but only the latter issue is before us.

charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life * * * and then to pay the principal to a charitable organization, the present value of the remainder is deductible." Where a trustee has a power to divert the principal to a noncharitable use, "the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power." Treas. Reg. § 20.2055-2(b).

Two Supreme Court cases have established what have become the traditional rules of thumb in applying Section 2055 and its regulations to specific instruments. In *Ithaca Trust Company* v. *United States*, 279 U. S. 151 (1929), the trust allowed the life beneficiary to withdraw from the principal any amount "that may be necessary to suitably maintain her in as much comfort as she now enjoys." Justice Holmes, in allowing a charitable deduction, remarked that "the standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator * * * was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs." 279 U. S. at 154.

The second Supreme Court case, *Merchants National Bank* v. *Commissioner*, 320 U. S. 256 (1943), involved a trust in which the grantor authorized the trustee to invade corpus "for the comfort, support, maintenance, and/or happiness" of his wife. The grantor stated further that "it is my wish * * * that * * * my said Trustee shall exercise its discretion with liberality to my said wife, and

consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust." The Court denied the charitable deduction, stating that "the extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life. Compare *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. Here, for example, her 'happiness' was among the factors to be considered by the trustee." 320 U. S. at 261. The Court was willing to assume the unlikelihood of invasion. Nevertheless,

> * * * Congress has required a more reliable measure of possible expenditures and present value than is now available for computing what the charity will receive. The salient fact is that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction. This is not a "standard fixed in fact and capable of being stated in definite terms of money." *Cf. Ithaca Trust Co.* v. *United States, supra.* Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. [320 U. S. at 262-63.]

From these Supreme Court pronouncements there have been distilled generally accepted principles. For a charitable remainder subject to invasion to be deductible, it must first be established that the instrument contains an ascertainable standard of invasion, *i. e.*, one which is capable of being stated in definite terms of money. In all cases allowing the deduction, this ascertainable standard has been the standard-of-living criterion, either expressly stated or implied from the language of the instrument. If no such standard exists, the charitable deduction is denied,

no matter how remote the possibility of invasion might be. If the instrument contains such a standard, then the court will determine the likelihood of invasion. *See e. g., Salisbury* v. *United States*, 377 F. 2d 700, 703 (2d Cir. 1967); Rev. Rul. 54-285, 1954-2 Cum. Bull. 302; Taggart, *Charitable Deductions for Transfers of Remainder Interests Subject to Invasion*, 21 Tax L. Rev. 535, 562 (1966); Albert, *Merchants National Bank* v. *Commissioner and its Uncharitable Aftermath*, 67 Dick. L. Rev. 145, 148 (1963):

In determining whether an ascertainable standard exists, we must interpret the instrument's language in conformity with state law. See *Blodget* v. *Delaney*, 201 F. 2d 589 (1st Cir. 1953). Thus our problem may be stated as whether, under the law of Kansas, Paragraph 5 of the trust limits the invasion of principal to the standard-of-living criterion.

Similar problems under section 2055 and its predecessor have often been resolved by deciding whether the language of the instrument in question more nearly resembled that in *Ithaca* or *Merchants Bank*. Paragraph 5 of the trust before us contains language similar to the invasion-of-principal clauses in both *Ithaca* and *Merchants Bank*. It resembles *Merchants Bank* in two respects. First, principal may be invaded for the "comfort, welfare, contentment and happiness" of grantor's wife. The phrase in *Merchants Bank* was "comfort, support, maintenance, and/or happiness." Secondly, the trustee in the case before us is admonished tha

> while said Trust Estate should not be depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live, her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees * *

In *Merchants Bank* the admonitory clause stated that the trustee should "exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust."

The following language of Paragraph 5 resembles the trust in *Ithaca*:

> In determining the necessity or advisability of making such payments or distributions out of principal * * * the Trustee shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her entire lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live * * *.

The trust in *Ithaca* allowed withdrawal of such sums as "may be necessary to suitably maintain her in as much comfort as she now enjoys."

The government argues that because principal may be invaded for the "happiness" of the life beneficiary and because the trustee is admonished that the life beneficiary's "enjoyment of the benefits of the said trust estate shall be considered as paramount to the conserving of assets * * * for the benefit of the distributees," the standard of invasion falls within the rule of *Merchants Bank* as being too indefinite. The government recognizes that the standard-of-living clause meets the requirement for definiteness, but argues that where an instrument contains both a broad and a narrow standard of invasion, the instrument must be treated as permitting invasion to the extent of the broader standard. In other words, the broad or indefinite standard establishes the outermost limit of invasion, not the narrow or definite one. See *Union Trust Company* v. *Tomlinson*, 355 F. 2d 40 (5th Cir. 1966).

Taxpayer contends that *Merchants Bank* and all the other decisions denying a charitable deduction have involved instruments which contained no standard-of-living clause, and that where such a clause is present, words such as "happiness" are of no importance since they must be interpreted to mean the same thing as the standard-of-living clause.

We do not agree with this argument. It is not true, as taxpayer asserts, that "all of the decisions denying charitable deductions in computing estate tax are those having no standard-of-living clause." Several cases denying the deduction have involved instruments with either an express standard-of-living clause or language which is commonly construed as establishing a standard-of-living criterion. The fatal defect of those instruments was that they contained, in addition to the definite standard, language which went beyond the permissible limits established by *Ithaca* and *Merchants Bank*.

In *Union Trust Company* v. *Tomlinson*, 355 F. 2d 40 (5th Cir. 1966), the trust expressly established a standard-of-living test for invasion of principal. The trust went on to say, however, that the trustee should "give sympathetic consideration to any requests that my wife may make from time to time," and the trustee was authorized "to be generous in the exercise of this discretion even though there may be considerable depletion of the Trust Estate." It was held that the latter language made the standard of invasion too indefinite to permit the deduction.

Likewise, in *State Street Bank & Trust Company* v. *United States*, 313 F. 2d 29 (1st Cir. 1963), the will allowed invasion of principal for the benefit of the widow as the trustees "in their uncontrolled discretion may deem necessary or advisable for her comfortable support and maintenance and for any other reasonable re-

quirement * * *." The court held that "comfortable support and maintenance" established the standard-of-living test, but that "any other reasonable requirement" authorized a higher and immeasurable standard. See also *Gammons* v. *Hassett*, 121 F. 2d 229 (1st Cir.), *cert. denied*, 314 U. S. 673 (1941); *Marine Trust Company* v. *United States*, 247 F. Supp. 278 (W.D. N.Y. 1965); *Vaccaro* v. *United States*, 224 F. Supp. 307 (D. Mass. 1963).

These authorities support the government's contention that where an instrument contains both a broad and a narrow standard of invasion, the broad standard should be given effect. It seems that to do otherwise would require the court to ignore the broader language.

Taxpayer argues, however, that under Kansas law the word "happiness" does not enlarge the standard-of-living test. Taxpayer relies on one Kansas case to support this proposition, *In re Estate of Woods*, 181 Kan. 271, 311 P. 2d 359 (1957). Paragraph b of the instrument in *Woods* gave the income to testator's wife for life, then stated that

> Upon the death of my wife, if my daughter Catherine has survived her, it is my will * * * that if and when my said daughter's personal funds become depleted, from that time on the entire net income from said trust estate be paid to my said daughter * * *. [311 P. 2d at 364.]

Paragraph d allowed invasion of corpus for the benefit of testator's wife and daughter according to the standard-of-living criterion. In Paragraph e, testator stated that the "essence" of his testament was first to provide for the "comfort and happiness" of his wife and daughter and directed that the funds be applied to that purpose "without stint or quibble."

Testator's daughter, a cotrustee, sought to establish her right to receive the income from the trust after the death

of her mother, alleging that her personal funds had become "depleted" within the meaning of Paragraph b. The trial court denied the daughter's claim on the ground that her funds were not sufficiently depleted. The Supreme Court of Kansas reversed on this point. The supreme court stated that in Kansas "the intention of a testator must be determined from the whole will—from the four corners of the instrument." 311 P. 2d at 365. From Paragraphs b, d, and e, the court determined that testator intended for the daughter to receive income when her funds were so depleted as to prevent her from maintaining the standard of living she had grown accustomed to in testator's lifetime. The daughter's funds were sufficiently depleted to allow her to share in the income. 311 P. 2d at 366-67.

Woods does offer some support for the proposition that under Kansas law the word "happiness" does not broaden the standard-of-living test. However, it is far from a direct holding to that effect. The court did not have occasion to pass upon the permissible scope of the power of invasion. The question before it was whether the beneficiary's funds had been sufficiently "depleted" to allow her to receive income from the trust. The court never considered the question of whether she was entitled to funds in excess of those necessary to maintain her standard of living. Only if it had, would the question before us have been decided. In view of the almost unanimous holdings of other courts that "happiness" creates a broader, more subjective test than the standard-of-living clause, we are unable to conclude from *Woods* that Kansas would limit invasion of corpus in the instant case to the standard-of-living criterion.

Taxpayer also relies on *United States* v. *Powell*, 307 F. 2d 821 (10th Cir. 1962). The trustee in *Powell* was authorized to invade principal "for the maintenance, welfare, comfort or happiness" of the beneficiaries and was

admonished that, before principal was invaded, he should "deem that the purpose for which the payments are to be made, justifies the reduction in the principal * * *."

The court found "happiness" to have the same meaning as "welfare" and "comfort," which are commonly construed to impose the standard-of-living test. *Merchants Bank* was distinguished on the ground that there the trustee had been given a broader power of invasion:

> It is clear, we think, that the court accorded such broader connotation to the word "happiness," because of the context in which it was found and, particularly, the instructions to the trustee to exercise its discretion with liberality to the wife and to consider her welfare, comfort and happiness prior to the claims of the residuary beneficiaries. [307 F. 2d at 827.]

The instrument in *Powell*, on the contrary, "indicated that the power should be exercised with restraint and only when the purpose justified a reduction of the corpus * * *." 307 F. 2d at 828.

We believe that *Powell* is distinguishable from the instant case for the same reason it was distinguished from *Merchants Bank*. The trustee in the instant case was told in the second sentence of Paragraph 5 that the life beneficiary's "enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets * * * for the benefit of the distributees * * *." This language is comparable to the admonitory clause in *Merchants Bank* which was used by the *Powell* court to explain the broad interpretation of "happiness" in *Merchants Bank*.

The phrase "said Trust Estate should not be depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will

be endangered so long as the Grantor's said wife shall live" does not so restrict the power of invasion as to bring the trust in this case within the scope of *Powell*. The "purposes and intentions" referred to are: "providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her entire lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live * * *." Thus the aforementioned phrase means only that the principal is not to be depleted so rapidly as to exhaust it before the life beneficiary's death, and is not inconsistent with an interpretation of "happiness" in accord with *Merchants Bank* and the vast majority of subsequent cases.

The question we must decide is whether a Kansas court would allow invasion of the trust principal under Paragraph 5 beyond the standard-of-living criterion. Although *Woods* and *Powell* indicate that in Kansas "happiness" is not a magic word compelling the automatic consequence of indefinitely broad powers of invasion, we do not construe Paragraph 5 as limiting the trustee to the standard-of-living criterion.

Powell establishes that we are to gather the intent of the testator from the instrument as a whole. It is clear that the whole of Paragraph 5, save for the phrase "and in order that she may continue to live in the manner in which she has been accustomed to live," indicates the intent to allow invasion of principal beyond the standard-of-living test. In 1954 when this trust was drafted, *Merchants Bank* had for 11 years been a landmark decision in this area of the law. To all lawyers practicing in the estate tax field, the Supreme Court's interpretation of "happiness" must have been abundantly clear. The consequences of an admonitory clause stating that the life beneficiary's enjoyment was to be "paramount" to the conserv-

ing of assets for the remainderman must also have been apparent. *Powell* and *Woods*, the two cases relied upon by taxpayer to show that Kansas would interpret Paragraph 5 was establishing a standard-of-living test, were not decided until after this trust was drafted. The inclusion of the standard-of-living test does not nullify the purport of the entire remainder of Paragraph 5. Its effect is to create a definite, minimum standard of invasion in addition to the indefinite standard established by the rest of the paragraph. Under the reasoning of *Union Trust* and *State Street*, the scope of invasion cannot be limited to the standard-of-living clause. Since the standard of invasion is fatally indefinite, it is unnecessary to inquire into the probability of invasion.

REVERSED AND REMANDED.

APPENDIX A-2

Opinion

Woods does offer some support for the proposition that under Kansas law the word "happiness" does not broaden the standard-of-living test. However, it is far from a direct holding to that effect. The court did not have occasion to pass upon the permissible scope of the power of invasion. The question before it was whether the beneficiary's funds had been sufficiently "depleted" to allow her to receive income from the trust. The court never considered the question of whether she was entitled to funds in excess of those necessary to maintain her standard of living. Only if it had, would the question before us have been decided. In view of the almost unanimous holdings of other courts that "happiness" creates a broader, more subjective test than the standard-of-living clause, we are unable to conclude from *Woods* that Kansas would

limit invasion of corpus in the instant case to the standard-of-living criterion.

Taxpayer also relies on *United States* v. *Powell*, 307 F. 2d 821 (10th Cir. 1962). The trustee in *Powell* was authorized to invade principal "for the maintenance, welfare, comfort or happiness" of the beneficiaries and was admonished that, before principal was invaded, he should "deem that the purpose for which the payments are to be made, justifies the reduction in the principal * * *."

The court held the charitable remainder deductible. "Happiness" was found to have the same meaning as "welfare" and "comfort," which are commonly interpreted to impose the standard-of-living test. *Merchants Bank* was distinguished on the ground that there the trustee had been given a broader power of invasion:

> It is clear, we think, that the court accorded such broader connotation to the word "happiness," because of the context in which it was found and, particularly, the instructions to the trustee to exercise its discretion with liberality to the wife and to consider her welfare, comfort and happiness prior to the claims of the residuary beneficiaries. [307 F. 2d at 827.]

The instrument in *Powell*, on the contrary, "indicated that the power should be exercised with restraint and only when the purpose justified a reduction of the corpus * * *." 307 F. 2d at 828.

We believe that *Powell* is distinguishable from the instant case for the same reason it was distinguished from *Merchants Bank*. The trustee in the instant case was told in the second sentence of Paragraph 5 that the life beneficiary's "enjoyment of the benefits of said Trust Estate should be considered as paramount to the con-

serving of assets * * * for the benefit of the distributees * * *." This language is comparable to the admonitory clause in *Merchants Bank* which was used by the *Powell* court to explain the broad interpretation of "happiness" in *Merchants Bank*.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9741

UNITED STATES OF AMERICA,
Appellant,

vs

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS,
Appellees.

PETITION FOR REHEARING

Introductory Statement

Appellees, The Commercial National Bank of Kansas City and The Boatmen's National Bank of St. Louis, respectfully petition this Honorable Court for rehearing of the decision and opinion in Case No. 9741 filed May 29, 1968, whereby the Court reversed the decision of the Trial Court which granted summary judgment in favor of said appellees. In support of its position, appellees state that the opinion erred in construing the law of Kansas respecting property rights arising out of testamentary instruments and apparently gave no consideration to sworn statements made by competent parties in connection with the intent and meaning of the provisions contained in the governing instrument which gave rise to this litigation

Appellees' Basis for Urging Rehearing and Reconsideration

In the first full paragraph on page seven (7), the opinion states that the problem is whether, under the law of Kansas, paragraph five (5) of the trust limits the invasion of principal to the standard-of-living criterion. The decision, however, appears to be based on Court decisions other than those involving Kansas law.

The District Court's decision was made by a Kansas jurist well-versed in Kansas law. There, the Court gave consideration to sworn testimony of Robert B. Langworthy (R. 54-66), Lucy Tullock Washburn (R. 38-42) and C. D. Cowdery (R. 43-45). These affiants testified factually as to the *intention* of the parties regarding the meaning of the Trust Agreement. It should be noted that the testimony submitted by these parties is competent proof. The testimony is not spurious in its origin but comes from responsible citizens making up the backbone of this country. The testimony is proof that it was the intention of the parties that the surviving spouse would be entitled to distributions from corpus *only* in order to live in the manner in which she had been accustomed to live. This testimony contained in the respective affidavits should not be disregarded as self-serving. Sworn testimony cannot be discarded merely because it supports that for which the witness contends. See *National Labor Relations Board* v. *Walton*, 286 F. 2d 26. The testimony in the form of affidavits is competent and admissible in proof of the facts therein stated, to include the testimony as to the law of Kansas. See *Mappes* v. *United States*, 318 F. 2d 508 (Court of Appeals, Tenth Circuit).

It is to be noted that the appellant did not introduce evidence or testimony that rebutted or neutralized that advanced by appellees in the District Court. Since the af-

fidavits made up the only testimony, were not contradicted or disputed and were offered in proof of the intent of the parties concerned, it follows that the Court should give them due consideration in its decision respecting its interpretation of the governing instrument. In essence there exists uncontroverted proof of the intention contained in the governing instrument, i. e., the surviving spouse would be entitled to only that required to maintain the standard of living to which she was accustomed at the time of her husband's death, but the very opposite determination has been made by the Court.

A. The power to invade corpus

(1) Appellees in their brief have cited the Kansas Supreme Court decision *In re Estate of Woods,* 181 Kan. 271, in support of their contention that only an ascertainable standard existed in the governing instrument and the trustees were powerless to invade corpus for the benefit of the life tenant (surviving spouse) except to maintain her in the manner to which she had grown accustomed to live at the time of death of the Settlor. The Court reiterates the Kansas law on page 279 where it states:

> "We can see no other result to this phase of the lawsuit than that Catherine is entitled to the net proceeds of testator's estate and if the executor-trustee is of the opinion that such a share is too large, then it is his right to request, and her duty to furnish, a report so that it can be determined by the executor-trustee, and in turn by the court, to what sums she is entitled from time to time to keep her in that position in life intended by the testator."

In so stating the Kansas Supreme Court acknowledged the well settled law of Kansas that a Court of equity has power to review the exercise of discretionary powers conferred upon trustees and to correct any abuse in the exercise of such discretion.

There seems to be no other logical conclusion in view of the testimony and the provisions of the instrument itself, but that the trustees would have invited surcharge and litigation had they indiscriminately administered the trust in favor of the life beneficiary to the detriment of the remaindermen, i. e., had they provided more than what was necessary to maintain the certain standard of living of the life beneficiary.

(2) The opinion of the Court of Appeals places enormous weight on the use of the word *happiness* in the governing instrument, thus concluding that an ascertainable standard as required by law does not exist.

Under the law of Kansas, it is not permissible to pick out some single words or phrases to determine intention but on the contrary the whole instrument in its entirety is to be considered. See *Williams* v. *McKinney*, 34 Kan. 514; *In re Estate of Buckner*, 186 Kan. 183; *In re Estate of Ellertson*, 157 Kan. 492; *Morse* v. *Henlon*, 97 Kan. 399; *Ernst* v. *Foster*, 58 Kan. 438; *Shanny* v. *Strong*, 160 Kan. 206; *National Life Ins. Co.* v. *Watson*, 141 Kan. 903; *In re Estate of Woods*, 181 Kan. 271; *United States* v. *Powell*, 307 F. 2d 821. The Kansas law is also clear on the point that it is not permissible to employ rules of construction where the intention is expressed clearly and unequivocally in the will. See *National Life Ins. Co.* v. *Watson*, 141 Kan. 903; *Morse* v. *Henlon*, 97 Kan. 399; and *In re Estate of Ellertson*, 157 Kan. 492.

It is strongly urged that the fundamental Kansas rule regarding the interpretation of testamentary instruments be applied herein, which rule is that the intention of the testator is to be gathered from the will as a whole and that intention must prevail if it is consistent with the rules of law. As the Kansas Supreme Court stated in *Ellertson*:

"The will is to be construed so as to give effect to every part thereof, providing an effect can be given to it which appears to be consistent with the purposes of the testator as gathered from the entire will, and to effectuate rather than defeat the intention of the testator. Controlling significance is not to be given to one of the terms of devise or bequest and other terms ignored."

B. The opinion erroneously interprets U. S. v. Powell, 307 F. 2d 821.

Appellees wish to bring to the Court's attention that an erroneous conclusion is contained in its opinion. On page 12 of the opinion, after stating the essential elements of *Powell*, the following sentence appears:

"The Court held the charitable remainder deductible." Of course *Powell* does not involve a charitable remainder question but instead concerns itself with the question of a Power of Appointment as contemplated under Section 811 of the 1939 Code, now Section 2041 of the 1954 Code. It was the Government's contention that a trust created by the decedent (Mr. Powell) some 22 years before his death was includible in his gross estate. In creating the trust, Mr. Powell named himself as a joint trustee with certain powers that gave rise to the contention that for virtually all intents and purposes the retention of said powers made him (Mr. Powell) the equitable owner of the trust assets at his death and they were thus includible in his estate for estate tax purposes.

This Court in *Powell*, in its discussion of *the power to invade corpus*, determined that there was nothing in the context of the *Powell* instrument in which the term *"happiness"* is found, or in the instrument as a whole, that indicated an intent that it should be given a broader connotation than its usual and ordinary meaning. In fact this Court found that the qualifying language—

> *". . . provided that the trustee shall deem that the purpose for which the payments are to be made, justifies the reduction in the principal of the trust properties."*

indicated the contrary. The *Washburn* instrument specifically admonishes the trustee not to deplete the trust estate *"by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live. . ."* From this it follows that any reduction in corpus would have to be justified and in this respect it is important to note that the Grantor's wife had nothing to say in regard to reductions for her benefit.

The final portion of paragraph 5 of the Trust Agreement—

> *". . . her enjoyment of the benefits of said Trust Estate should be considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in paragraph 9 of this Agreement."*

means nothing more than (1) the Grantor's wife is entitled to the trust assets first, but *not* in excess of the standard of living requirement previously set forth and (2) the Trustee is protected from a remainderman who might claim that the Trustee favored one beneficiary over another, without sufficient authorization.

C. Motion to dismiss.

Appellees request the Court to consider their timely filed motion to dismiss the appellant's appeal. Consideration of this point does not appear in the Court's decision of May 29, 1968. Grounds for said motion to dismiss are that the notice of appeal was not filed within sixty (60) days from the date of the judgment appealed from as required by Rule 73 (a), Federal Rules of Civil Procedure.

Appellants contend that since a monetary figure did not appear in the Memorandum of Decision handed down by the District Court on December 23, 1966, a judgment as contemplated for the purposes of appeal was not in existence at that time. It is their contention that the critical point of time began on June 1, 1967, when an entry showing the amount of money to be refunded was entered in conformity with the judgment rendered December 23, 1966. Consequently, the Notice of Appeal filed July 28, 1967, was timely in its views.

The District Court in its order for summary judgment stated:

> "There is no dispute among the parties as to the amount of the refund to which plaintiffs (*appellees herein*) would be entitled should this court find that the claimed deduction should be allowed. Having so found, and there remaining nothing further for determination, the court directs that the plaintiffs' motion for summary judgment be granted, and that the motion of the defendant be denied. It is so ordered."

The June 1, 1967, entry did nothing more than to recite in dollars and cents the amount to be refunded which amount was known by all concerned and was not in *dispute.*

In *United States* v. *F. & M. Schaefer Brewing Co.*, 78 S. Ct. 674, Mr. Justice Whittaker stated that a judgment for money is final for the purposes of Rule 73 (a) if the amount is either shown in dollars and cents or "the means for determining the amount" is stated. The Memorandum of Decision by the District Court states:

> "There is no dispute among the parties as to the amount of the refund. . ."

Certainly this tells us that the amount was known by both parties and was a fixed figure to be obtained by strictly mechanical means. This figure simply depends upon the al-

lowance of the charitable deduction claimed. In granting the Summary Judgment to the plaintiffs, the charitable deduction claimed on the estate tax return was given judicial sanction thus paving the way or affording "the means for determining the amount." Accordingly, the time to appeal under Rule 73(a) began to run from the date of docket entry by the Clerk of the Court:

> "There was entered on the docket December 23, 1966, a MEMORANDUM OF DECISION—granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment—a copy of which is enclosed." (R. 166)

Conclusion

1. Appellees respectfully submit that the vital and controlling factors of this dispute are the Kansas decisions which have time after time reiterated the principles that—

> (a). The whole purpose of construing a Will or other instrument affecting property rights is to discover the real intention of the testator or grantor,
>
> (b) in order to determine that intention it is not permissible to pick out some single words or phrases but on the contrary the whole instrument in its entirety is to be considered, and
>
> (c) there is no occasion for employing any rules of construction where the intention is expressed clearly and unequivocally in the Will.

2. The Court is urged to consider the sworn testimony of competent witnesses which testimony was considered by the District Court and was not contradicted nor disputed by appellants. Through this testimony, it is again evident that the grantor's intent was to permit invasion of corpus *only* to the extent necessary for the life beneficiary to continue to live in the manner in which she had been accustomed to live.

3. The instrument at hand, with respect to the possibility of invasion of corpus, provides an adequate safeguard in the form of a disinterested trustee. This trustee must exercise its sole discretion in conformity with applicable law and is required to perform according to trustee standards. The trustee is not at the mercy or whim of a beneficiary who can lawfully divert the charitable interest. There is no risk falling on the Government other than *the general uncertainty that attends human affairs, Ithaca Trust Co.*

4. In filing its Notice of Appeal, it appears that appellants were more than five months late as contemplated by Rule 73(a), Federal Rules of Civil Procedure.

5. Appellees are under the impression that the United States Courts of Appeals normally defer on questions of state law to the considered opinion of a United States District Judge sitting in such state and who has had long experience as a jurist and attorney in that state, particularly where none of the Court of Appeals Judges deciding the case had practiced in or been permanently assigned as a trial judge in such state. Such a procedure appears to have been followed in *United States* v. *Powell*, 307 F. 2d 821, particularly on page 823 of the opinion where the findings of the District Court are discussed. For this reason Appellees had assumed that the interpretation of this Kansas instrument by the Kansas District Court would be accepted by the members of the Tenth Circuit Court of Appeals. The instrument at hand was interpreted by Judge Stanley, a jurist with long experience in Kansas law. However, appellees are willing to seek an independent interpretation in the Kansas State Courts if this Court will stay the present proceedings until such an interpretation can be obtained.

Accordingly, in view of the foregoing, appellees respectfully request the Court to grant this Petition for Rehearing

for the purpose of reconsidering and re-evaluating its decision.

Respectfully submitted,

ROBERT B. LANGWORTHY
JAMES J. MELCHING
Floor Three, Union National Bank Building
Kansas City, Missouri 64106
Attorneys for Plaintiffs-Appellees

Of Counsel:

LINDE, THOMSON, VANDYKE, FAIRCHILD & LANGWORTHY
Floor Three, Union National Bank Building
Kansas City, Missouri 64106
HOMER DAVIS
Leavenworth, Kansas 66048
LEWIS, RICE, TUCKER, ALLEN & CHUBB
611 Olive Street
St. Louis, Missouri 63101

Certificate of Counsel

I, ROBERT B. LANGWORTHY, counsel for appellees in the above entitled cause, do certify that after careful examination of the opinion of this Court, I verily believe that the facts stated above and the items quoted in the above and foregoing Petition for Rehearing have been overlooked by the Court and that these facts are material; and I also verily believe that the Court has overlooked and failed to apply the decisions and law set out in said Petition which are controlling and which require a different judgment from that rendered; I do further certify that this Petition for Rehearing is filed in good faith and not for the purpose of delay.

Dated this 14th day of June, 1968.

ROBERT B. LANGWORTHY
One of the Attorneys for Appellees

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

OFFICE OF THE CLERK
Denver, Colorado 80202
July 5, 1968

No. 9741, U. S. A. vs. The Commercial National Bank of Kansas City, et al.

Mr. Bennet N. Hollander
Mr. Mitchell Rogovin, Assistant Attorney General
Department of Justice
Washington, D. C.

Gentlemen:

Enclosed is a revised copy of the opinion in the above captioned case. Please note the changes on pages 12 and 13.

An order has been entered today denying the petition for rehearing.

Yours very truly,

William L. Whittaker
Clerk

WLW:rhj

CC: Mr. Newell A. George, U. S. Attorney, Box 1537, Topeka, Ka.

Mr. James J. Melching, Third Floor Union National Bank, Kansas City, Missouri 64106

Mr. Homer Davis, 402 Shawnee Street, Leavenworth, Kansas

Messrs. Lewis, Richer, Tucker, Allen & Chubb, 1555 Railway Exchange, 611 Olive Street, St. Louis, Missouri 63101

P. S. In answer to your letter of July 2, 1968, the petition for rehearing was filed on June 17, 1968

MAY TERM, WEDNESDAY, MAY 29th, 1968.
Before Honorable Alfred P. Murrah, Chief Judge, Honorable Marvin Jones, Judge, United States Court of Claims, and Honorable Jean S. Breitenstein, Circuit Judge.

United States of America,
Appellant,

9741 vs.

The Commercial National Bank of Kansas City, a National Banking Association; The Commercial National Bank of Kansas City, a National Banking Association in its capacity as Administrator with Will Annexed of the Estate of Frank E. Washburn late of Leavenworth County, Kansas, Deceased;, The Commercial National Bank of Kansas City, a National Banking Association in its capacity as Executor of the Estate of Lucy Tullock Washburn, late of Leavenworth County, Kansas, Deceased; The Boatmen's National Bank of St. Louis, a National Banking Association; The Boatmen's National Bank of St. Louis, a National Banking Association in its capacity as Trustee of an express trust; and The Boatmen's National Bank of St. Louis, a National Banking Association in its capacity as a party with whom a contract has been made for the benefit of another,
Appellees.

Appeal from the United States District Court for the District of Kansas.

(Filed July 18, 1968. Charles W. Cahill, Clerk.
By Betty L. Ross, Deputy.)

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and the cause remanded for further proceedings in accordance with the views expressed in the opinion of the court.

A true copy
Teste
/s/ William L. Whittaker
William L. Whittaker
Clerk, U.S. Court of Appeals, Tenth Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

THE COMMERCIAL NATIONAL BANK OF KANSAS CITY and THE BOATMEN'S NATIONAL BANK OF ST. LOUIS, Plaintiffs vs. THE UNITED STATES OF AMERICA, Defendant	No. KC-2259

(Filed December 23, 1966. Charles W. Cahill, Clerk.
By /s/ Mary Jean Wiggans, Deputy.)

Memorandum of Decision

This action to recover a refund from the defendant of certain federal estate taxes is brought by the plaintiffs under the provisions of 26 U.S.C.A. § 2055(a)(2). The facts re-

quired to accomplish a complete determination of the issues presented by this controversy are not in dispute, and the case is now before this court upon motion by both plaintiffs and by defendant for summary judgment. This suit being one against the United States for the recovery of an internal revenue tax alleged to have been erroneously and illegally collected, this court has jurisdiction. 28 U.S.C.A. § 1346(a)(1).

The undisputed facts so far as pertinent to the issues now before the court are as follows: By inter vivos trust agreement executed June 19, 1954, Frank E. Washburn placed in trust the major portion of his estate. That agreement provided that he, the settlor, should receive the income therefrom until his death; thereafter the income to go to his wife, should she survive him, for her natural life, and at her death the principal to be distributed as follows: two-thirds to four nephews of the settlor, and the remaining one-third to be divided equally between two corporations. These latter two beneficiaries are of the kind referred to by the provisions of 26 U.S.C.A. § 2055(a)(2). After the death of the settlor, and in assessing the federal estate taxes due from his estate, the defendant disallowed a claim by the plaintiffs for a deduction from the gross value of the estate the aforementioned one-third of the principal of the trust to be distributed to "charitable" or "educational" corporations. The appropriate administrative procedures having been followed with respect to the disallowance of this claim, the plaintiffs filed this suit for refund in the amount of $19,614.05 with interest.

There is no question that, where a trust is created providing for the distribution of all or a part of the principal to a charitable corporation at the termination of the trust, the amount of such transfer may be deducted from the value of the gross estate for estate tax purposes under

§ 2055(a)(2). The controversy here arises out of a provision in the trust agreement permitting invasion of the principal by the trustee for the benefit of the surviving spouse of the settlor. This provision is set out in full:

> "5. In the event that the Grantor's wife, Lucy Tullock Washburn, shall survive the Grantor, and the Trust Estate hereby created shall not have theretofore been terminated, then in that event, if at any time or times during the lifetime of the Grantor's said wife, some emergency or contingency shall arise making it necessary or advisable in the sole judgment of the Trustee to pay or distribute to or apply for the benefit of the Grantor's said wife for her comfort, welfare, contentment and happiness, a portion or portions of the principal of said Trust Estate, the Trustee shall have full power and authority to pay or distribute to her, or to use or apply for her benefit for her comfort, welfare, contentment and happiness, such portion of the principal of said Trust Estate as the Trustee in its sole discretion shall deem necessary or advisable in all of the circumstances then existing. In determining the necessity or advisability of making such payments or distributions out of principal to the Grantor's said wife from the Trust Estate, the Trustee may take into consideration other income and cash resources available to the Grantor's said wife, and the Trustee shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live; and that while said Trust Estate should not be depleted by payments or distributions from principal to the extent that the carrying out of said purposes and intentions will be endangered so long as the Grantor's said wife shall live, her enjoyment of the benefits of said Trust Estate should be

considered as paramount to the conserving of assets in said Trust Estate for the benefit of the distributees hereinafter named in * * * this Trust Agreement."

The inclusion of this provision in the trust agreement caused the defendant to disallow plaintiffs' claim for a deduction of the transfer of one-third of the principal of the trust to certain charitable corporations. The question presented, then, is whether the value of a charitable transfer allowable as a deduction for federal estate tax purposes may be disallowed where, the charitable corporation being the distributee of the principal of a trust, the trust permits invasion of the principal of the trustee for the benefit of the life beneficiary.

As has already been noted, the provisions of 26 U.S.C.A. § 2055(a)(2) would permit the deduction sought by plaintiffs absent the provision permitting invasion of the corpus by the trustee. However, where such a provision is incorporated in the trust agreement, the Internal Revenue Regulations (§ 20.2055-2) provide as follows:

"(a) *Remainders and similar interests.* If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the noncharitable interest. * * * Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. * * *

"(b) *Transfers subject to a condition or a power.* * * * If an estate or interest has passed to or is vested in charity at the time of a decedent's death and the estate or interest would be defeated by the performance of some act or the happening of some event, the

> occurrence of which appeared to have been highly improbable at the time of the decedent's death, the deduction is allowable. If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, the deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of the power. * * *."

In determining the manner in which § 2055 and the Internal Revenue Regulations pertinent thereto are to be applied to charitable transfers such as that presented by the facts in this case, the Supreme Court has held that:

> "For a deduction under § 303(a)(3) [now § 2205(a)(2)] to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient. [citing] Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable." *Merchants Bank v. Commissioner*, 320 U.S. 256, 261 (1943).

What is required, therefore, in order that a charitable bequest subject to a condition be deductible is, first, an ascertainable standard whereby the value of the charitable bequest may be determined as of the date of the settlor's death, and second, a sufficient showing by the party asserting the claim for deduction that the chance of the charitable bequest being rendered ineffective is "highly improbable."

Regs. § 20.2055-2(b). That these two requirements must be satisfied is implicit in the cases. *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187 (1955); *Merchants Bank* v. *Commissioner, supra; United States* v. *Provident Trust Co.*, 291 U.S. 272 (1934); *Ithaca Trust Co.* v. *United States*, 279 U.S. 151 (1929). If either is not fulfilled by the instrument here in question, and the surrounding circumstances, the deduction cannot be allowed.

There is some dispute between the parties as to the probative value of extrinsic circumstances in construction of the provisions of the trust agreement. However, taking the view most favorable to the defendant, the court believes that the provisions of ¶ 5 of the instrument, without reference to extrinsic facts, set out a sufficient standard under the rule referred to above.

In *Ithaca Trust Co.* v. *United States, supra*, an appeal from denial of a charitable deduction sought under the provisions of what is now § 2055(a)(2), the Supreme Court held that an instrument creating a trust for the life of the decedent's wife, with a remainder to certain charities, but which permitted invasion of the principal of the trust to any extent "'that may be necessary to suitably maintain her in as much comfort as she now enjoys,'" contained a sufficient standard to permit deduction of the value of the charitable bequest. In so holding the court stated that:

> "* * * The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. * * * There was no uncertainty appreciably greater than the general uncertainty that attends human affairs." (p. 154).

The rule in the *Ithaca* case was that the limitation on the invasion of the corpus of a trust in favor of the life bene-

ficiary was sufficiently certain if it provided that such invasion could be made only to sustain the life beneficiary in the manner to which she had been accustomed at the death of the settlor. This rule is still the law. *Commissioner* v. *Sternberger's Estate, supra,* at 199; *Henslee* v. *Union Planters Bank,* 335 U.S. 595, 598 (1949). It is applicable to the instrument at hand.

In the construction of an instrument such as is presented by this case, the court cannot regard the terms therein as having been expressed in a void, wholly disjointed one from the other, but must read the provisions as a whole in arriving at the settlor's intent. The provision in the instrument creating the trust which provides for the invasion of the corpus thereof is extensive. It permits invasion of the corpus in the sole discretion of the trustee. In the entire context of the document, this must be taken to mean that no party other than the trustee may exercise the right to determine if an invasion of the corpus should be made. This grant of power is not, however, unbridled nor without restraint. Rather it is provided by the settlor that, in determining whether such power shall be exercised, the trustee:

> "* * * shall take into consideration that said Trust Estate is created by the Grantor for the purpose and with the intention of providing for the comfort, welfare, contentment and happiness of the Grantor's said wife throughout her lifetime, and in order that she may continue to live in the manner in which she has been accustomed to live * * *."

This language indicates that the corpus of the trust is not intended to be subject to invasion to satisfy the whim and notion of the life beneficiary, but rather that her welfare, comfort, contentment and happiness are to be determined with relation to that standard of living to which she had

been accustomed at the time of the settlor's death. This criterion, imposed upon the exercise of the power to invade, is determinable and may be expressed in money. It satisfies the requirements of 26 U.S.C.A. § 2055 and the regulations adopted pursuant thereto. *Ithaca Trust Co.* v. *United States, supra.*

In the exercise of the granted power the trustee is required to preserve a fair balance between the interests of the life beneficiary and those of the remaindermen, and in such actions it is subject to judicial review and control. Thus there was "* * * established an ascertainable, external and judicially enforceable standard and * * * the trustees, in exercising such power, were limited by such standard and the supervision and control of the courts of Kansas in the exercise of their equity powers." *United States* v. *Powell*, 307 F. 2d 821, 828 (10th Cir. 1962).

Having determined that the standards set out in the trust agreement governing the exercise by the trustee of his power to invade the corpus were sufficiently certain, there remains the question whether, at the time of the settlor's death, the circumstances then existing were such that the likelihood of that power ever being exercised prior to the termination of the trust was highly improbable. With regard to this question, the court finds from the undisputed facts that at the date of the settlor's death his widow was possessed of a personal estate more than twice the size of that constituting the corpus of the trust; that this estate alone produced income in excess of that required to maintain the widow's standard of living, such that the size of her personal estate increased during the period between her husband's death and her own; that she received outright a bequest of better than $100,000 from the settlor's estate; and that her standard of living was modest. These were matters which the trustee was

directed by the settlor to consider. Under these circumstances, the court finds that the possibility of invasion of the corpus by the trustee, considered as of the date of the settlor's death, was surely so unlikely as to be negligible. This is all that the law requires.

There is no dispute among the parties as to the amount of the refund to which plaintiffs would be entitled should this court find that the claimed deduction should be allowed. Having so found, and there remaining nothing further for determination, the court directs that the plaintiffs' motion for summary judgment be granted, and that the motion of the defendant be denied. It is so ordered.

Dated at Kansas City, this 23rd day of December, 1966.

Chief Judge

(Signed) Arthur J. Stanley, Jr.